

Lopez v 49 Wireless H, LLC

2011 NY Slip Op 32434(U)

August 31, 2011

Supreme Court, Suffolk County

Docket Number: 24919-2008

Judge: Melvyn Tanenbaum

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 13 - SUFFOLK COUNTY

P R E S E N T :

Hon. MELVYN TANENBAUM
Justice of the Supreme Court

Decision date 8-31-11

MOTION : MG; Case Disp.
R/D: 04/18/2011
S/D: 05/16/2011

MARCO LOPEZ, a/k/a RENE RODAS,

Plaintiff,

- against -

49 WIRELESS H, LLC and TRITEC BUILDING
COMPANY, INC.,

Defendants.

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Upon the following papers numbered 1 to 17 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11 - 15 ; Replying Affidavits and supporting papers 16 - 17 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for summary judgment dismissing the complaint on the grounds that (1) they cannot be held liable for a violation of Labor Law § 200 and common law negligence because the incident arose solely out of the means and methods of work utilized by the plaintiff's employer and they did not supervise or direct the plaintiff's work, and (2) they cannot be held liable for a violation of Labor Law § 241 (6) because the Industrial Code regulations relied on by the plaintiff are inapplicable to the facts of this case is granted. The complaint is hereby dismissed.

In this action, the plaintiff seeks to recover damages for personal injuries which he purportedly sustained on September 4, 2007 at a construction project located at 49 Wireless Boulevard in Hauppauge, New York. The construction site was owned by defendant 49 Wireless H, LLC (hereinafter 49 Wireless). Defendant Tritec Building Company, Inc. (hereinafter Tritec) entered into a contract with 49 Wireless to act as the general contractor for the project. Tritec subcontracted the demolition work for the project to the plaintiff's employer, non-party A1 Demolition. The plaintiff was purportedly injured when he was discarding pieces of metal debris into a dumpster and a sharp piece of metal cut through his glove and lacerated his finger. The plaintiff alleges that the defendants are liable for his injuries based on their violation of Labor Law §§ 200 and 241 (6) and common law negligence. He alleges that the defendants were negligent in their, supervision, maintenance, operation and control of the premises. Specifically, he alleges they were negligent in, *inter alia*, their operation and control of the construction site, allowing the premises to become and remain in a hazardous and dangerous condition, failing to take suitable precautions for the safety of persons working on the premises, failing to provide the plaintiff

with a safe place to work, failing to provide the plaintiff with adequate and proper safety equipment, and failing to properly store materials and equipment being used as part of the ongoing construction project.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see, Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra*). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see, Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra*).

The evidence submitted by the defendants demonstrates their *prima facie* entitlement to summary judgment dismissing the complaint. In support of their motion for summary judgment, the defendants submit, *inter alia*, the pleadings, the bill of particulars, the plaintiff's deposition testimony, the deposition testimony of Kenneth Abrami on behalf of Tritec and the affidavit of Robert Kent on behalf of 49 Wireless.

As is relevant to this motion, plaintiff testified that, on the date of the incident, he was employed as a helper by A1 Demolition performing demolition stripping construction sites and disposing of debris. At the subject job site, A1 Demolition was removing all interior walls of the building. He Also stated that he believed that supervisors from other entities were at the job site but that they did not direct him or his coworkers and did not give them any instructions or commands.

When plaintiff arrived at the work site on the accident date, the "rip out" had been performed and he and six or seven A-1 workers were instructed, by his employer, to carry away the debris starting with metal debris, some of which had many sharp edges. They placed the metal debris into a designated outside container. The workers carried the debris down to the open doorway of the container and threw the debris to the rear. Plaintiff testified that some of his coworkers left material in the front of the container which prevented him from walking into the container. According to the plaintiff no manager or supervisor directed them on the method of placement of the debris into the container. Plaintiff contends he was injured while attempting to throw a bundle of debris into the container with both hands. When he thereafter removed his hand from the debris and took off his work glove, it appeared that a piece of metal had ripped through the glove and lacerated his hand.

Kenneth Abrami, Vice President of Field Operations for Tritec, testified that Tritec was employed as the general contractor and construction manager on the subject job site pursuant to a written agreement with 49 Wireless. Tritec did not have any of its own laborers, but subcontracted all of the work to be performed at the site. Tritec retained A1 Demolition to perform the demolition work at the construction site. According to Abrami, the manner and method of the demolition and removal of material from the work site was determined by A1 Demolition. Abrami claimed that Tritec had no knowledge and did not participate in this process or procedure and did not provide any equipment for

A1. Abrami testified that he did not know who provided the containers for the demolition work, but that the contract between Tritec and A1Demolition provided that all debris associated with the demolition be placed in a debris container supplied and to be removed at its own expense by the demolition contractor. Abrami testified that Tritec employed a project manager who on a day to day basis inspected the job site. Tritec was responsible for site safety and had the authority to stop unsafe practices or programs.

Robert Kent was a managing member of TREC III, 49W, LLC, a member of 49 Wireless. He asserted that prior to September 4, 2007, 49 Wireless retained Tritec to act as general contractor and construction manager at the job site and that 49 Wireless did not have any employees or perform any work and did not direct or control any workers and did not supply any material or equipment to the workers.

The evidence submitted established the defendants' entitlement to summary judgment dismissing the plaintiff's claims for violation of Labor Law § 200 and common law negligence. Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site (*see, Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; *Cody v State of New York*, 82 AD3d 925, 919 NYS2d 55 [2d Dept 2011]; *Gasques v State of New York*, 59 AD3d 666, 873 NYS2d 717 [2d Dept 2009]; *Dooley v Peerless Importers*, 42 AD3d 199, 837 NYS2d 720 [2d Dept 2007]). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2d Dept 2008]; *see, Cody v State of New York, supra*). Contrary to the plaintiff's contention, the plaintiff's incident here stems not from a dangerous condition on the premises, but from the manner in which the work was being performed (*see, Cody v State of New York, supra; Gasques v State of New York, supra*).

To be held liable under Labor Law § 200 and for common-law negligence when the method and manner of the work is at issue, it must be shown that "the party to be charged had the authority to supervise or control the performance of the work" (*Ortega v Puccia, supra* at 61; *see, Mancuso v MTA N.Y. City Tr.*, ___ AD3d ___, 914 NYS2d 283 [2d Dept 2011]; *Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 913 NYS2d 684 [2d Dept 2010]; *La Veglia v St. Francis Hosp.*, 78 AD3d 1123, 912 NYS2d 611 [2d Dept 2010]; *Chowdhury v Rodriguez*, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; *Gasques v State of New York, supra; Orellana v Dutcher Ave. Bldrs.*, 58 AD3d 612, 871 NYS2d 352 [2d Dept 2009]; *Dooley v Peerless Importers, supra*). General supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under the statute (*see, La Veglia v St. Francis Hosp., supra; Orellana v Dutcher Ave. Bldrs., supra; Perri v Gilbert Johnson Enters.*, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]). The authority to review safety at the site, ensure compliance with safety regulations and contract specifications, and to stop work for observed safety violations is also insufficient to impose liability (*see, Austin v Consolidated Edison, supra; Capolino v Judlau Contr.*, 46 AD3d 733, 848 NYS2d 346 [2d Dept 2007]; *McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 839 NYS2d 164 [2d Dept 2007]; *Garlow v Chappaqua Cent. School Dist.*, 38 AD3d 712, 832 NYS2d 627 [2d Dept 2007]; *Perri v Gilbert Johnson Enters., supra; compare, Mancuso v MTA N.Y. City Tr., supra*). Rather, it must be demonstrated that the defendant controlled the manner in which the work is performed (*see, La*

Veglia v St. Francis Hosp., supra; cf., Rizzuto v L.A. Wenger Contr. Co., supra; Dooley v Peerless Importers, supra; Hughes v Tishman Constr. Corp., 40 AD3d 305, 836 NYS2d 86 [1st Dept 2007]

The evidence submitted was sufficient to establish, as a matter of law, that the defendants did not control the means or methods by which the plaintiff performed his work (*see, Austin v Consolidated Edison, Inc., supra; La Veglia v St. Francis Hosp., supra; Rivera v 15 Broad St., 76 AD3d 621, 906 NYS2d 333 [2d Dept 2010]; Ramos v Patchogue-Medford School Dist., 73 AD3d 1010, 906 NYS2d 45 [2d Dept 2010]; Sparendam v Lehr Constr. Corp., 24 AD3d 388, 807 NYS2d 335 [1st Dept 2005]; Dooley v Peerless Importers, supra; Blessinger v Estee Lauder Cos., 271 AD2d 343, 707 NYS2d 78 [1st Dept 2000]*).

In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's contention, no issue of fact as to a duty to plaintiff was created by the contract between 49 Wireless and Tritec. In the absence of proof of Tritec's actual control of the means and methods of the plaintiff's work, a contractual provision setting forth Tritec's general authority to supervise all of the work at the construction site is insufficient to impose liability (*see, McCarthy v Turner Constr., Inc., __ NY3d __, 2011 NY Slip Op 5541 [June 28, 2011]; see also, Bright v Orange & Rockland Utils., Inc., 284 AD2d 359, 727 NYS2d 449 [2d Dept 2001]*).

Furthermore, the evidence submitted establishes the defendants' entitlement to summary judgment dismissing the plaintiff's claims for violation of Labor Law § 200 and common law negligence on alternative grounds. It is well settled that the common-law duty to provide employees with a safe place to work does not extend to hazards that are part of, or inherent in, the very work the employee is to perform or defects that the employee is hired to repair (Hansen v Trustees of the M.E. Church of Glen Cove, 51 AD3d 725, 858 NYS2d 303 [2d Dept 2008]; see, Kowalsky v Conreco Co., 264 NY 125, 190 NE 206 [1934]; Bedneau v New York Hosp. Med. Ctr. of Queens, 43 AD3d 845, 841 NYS2d 689 [2d Dept 2007]). Here, the evidence establishes that the plaintiff's purported injuries were caused by the demolition debris that he was hired to remove from the premises and dispose of (*see, Gurung v Arnav Retirement Trust, 79 AD3d 969, 915 NYS2d 97 [2d Dept 2010]; Hansen v Trustees of the M.E. Church of Glen Cove, supra; Bedneau v New York Hosp. Med. Ctr. of Queens, supra; Appelbaum v 100 Church L.L.C., 6 AD3d 310, 774 NYS2d 705 [1st Dept 2004]; Brugnano v Merrill Lynch & Co., 216 AD2d 18, 627 NYS2d 635 [1st Dept 1995]*).

Accordingly, the branch of the defendants' motion which seeks summary judgment dismissing plaintiff's causes of action alleging violation of Labor Law § 200 and negligence is granted.

The defendants also established a *prima facie* entitlement to summary judgment dismissing the plaintiff's claims to recover damages pursuant to Labor Law § 241 (6). In opposition, the plaintiff failed to raise a triable issue of fact as to the defendants' liability under Labor Law § 241 (6). This statute requires owners and general contractors to "provide reasonable and adequate protection and safety" for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor (Rizzuto v L.A. Wenger Contr. Co., supra; Forschner v Jucca Co., 63 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; Cun-En Lin v Holy Family Monuments, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]). In order to recover damages on this cause of action, a plaintiff must establish the

defendant's violation of an Industrial Code provision which sets forth specific safety standards and that such violation was a proximate cause of the accident (*see, Rizzuto v L.A. Wenger Contr. Co., supra; Ross v Curtis-Palmer Hydro-Elec. Co., supra; Ramos v Patchogue-Medford School Dist., supra; Hricus v Aurora Contrs., 63 AD3d 1004, 883 NYS2d 61 [2d Dept 2009]; Seaman v Bellmore Fire Dist., 59 AD3d 515, 873 NYS2d 181 [2d Dept 2009]; Fitzgerald v New York City School Constr. Auth., 18 AD3d 807, 808, 796 NYS2d 694 [2d Dept 2005]*). The rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (*see, Forschner v Jucca Co., supra; Cun-En Lin v Holy Family Monuments, supra*).

Here, the plaintiff contends that the defendants violated regulations 12 NYCRR §§ 23-1.5 (a), 23-1.5 (b), 23-1.7 (e) (2), 23-1.8, 23-1.20, 23-2.1 (b), 23-3.3 (c) and 23-3.3 (e). At the outset, 12 NYCRR § 23-1.5 (a) and (b) set forth only general safety standards and are, thus, incapable of supporting a Labor Law § 241 (6) claim or cause of action (*see, Ulrich v Motor Parkway Props., LLC, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]; Timmons v Barrett Paving Materials, Inc., 83 AD3d 1473, 920 NYS2d 545 [4th Dept 2011]; Spence v Island Estates at Mt. Sinai II, LLC, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; Pereira v Quogue Field Club of Quogue, Long Is., 71 AD3d 1104, 898 NYS2d 220 [2d Dept 2010]*). 12 NYCRR 23-2.1 (b), which applies to tripping hazards in working areas, also lacks the specificity required to support a cause of action under Labor Law § 241 (6) (*see, Parrales v Wonder Works Constr. Corp., 55 AD3d 579, 866 NYS2d 227 [2d Dept 2008]; Salinas v Barney Skanska Constr. Co., 2 AD3d 619, 769 NYS2d 559 [2d Dept 2003]*).

The remainder of the regulations identified by the plaintiff as a basis for defendants' liability under Labor Law § 241 (6) are not applicable to the facts of this case and/or were not a proximate cause of the plaintiff's injuries. 12 NYCRR § 23-1.7 (e) (2), entitled tripping and other hazards, provides that work areas shall be kept free from accumulations of dirt, debris, scattered tools, materials and from sharp projections insofar as may be consistent with the work being performed. In this case, plaintiff was not injured as a result of tripping over, or slipping on, "accumulated" debris, dirt, tools or materials (*see, Pope v Safety & Quality Plus, Inc., 74 AD3d 1040, 903 NYS2d 124 [2d Dept 2010]; Spence v Island Estates at Mt. Sinai II, LLC, supra*). In addition, this regulation does not apply to the facts of this case where the purported accumulated debris was an integral part of the work the plaintiff was performing (*see, Cody v State of New York, supra; Lech v Castle Vil. Owners Corp., 79 AD3d 819, 913 NYS2d 713 [2d Dept 2010]; Salinas v Barney Skanska Constr. Co., supra*).

12 NYCRR 23-1.8, which requires the provision of certain personal protective equipment to workers engaged in certain activities, is inapplicable to the facts of this case as the plaintiff was not engaged in any of those activities when the accident occurred and the absence of such equipment did not lead to his injuries (*see, Zamajtys v Cholewa, 84 AD3d 1360, 924 NYS2d 163 [2d Dept 2011]; Pereira v Quogue Field Club of Quogue, Long Is., supra*).

12 NYCRR 23-1.20, which provides certain guidelines with respect to "chutes" is inapplicable to the case at bar since no such device was provided or used for the work which was being performed (*see, La Veglia v St. Francis Hosp., supra; Fried v Always Green, LLC, 77 AD3d 788, 910 NYS2d 452 [2d Dept 2010]*).

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12 NYCRR 23-3.3[c], “fashion[s] a safeguard in the form of continuing inspections, against hazards which are created by the progress of the demolition work itself” (Salinas v Barney Skanska Constr. Co., *supra* quoting Monroe v City of New York, 67 AD2d 89, 100, 414 NYS2d 718 [2d Dept 1979]; *see also*, Martins v Board of Educ. of City of New York, 82 AD3d 1062, 919 NYS2d 196 [2d Dept 2011]). This provision is inapplicable where, as here, the hazard which injured the plaintiff did not involve structural instability caused by the progress of the demolition (*see*, Campoverde v Bruckner Plaza Assoc., L.P., 50 AD3d 836, 855 NYS2d 268 [2d Dept 2008]; Ofri v Waldbaum, Inc., 285 AD2d 536, 728 NYS2d 74 [2d Dept 2001]).

Lastly, 12 NYCRR 23-3.3, applying to buckets and hoists, does not apply to the facts of this case (*see*, Campoverde v Bruckner Plaza Assoc., L.P., *supra*). “This rule obviously applies to debris being removed from a height to the ground and does not apply in the present situation where debris on the ground was being collected” (Freitas v New York City Transit Auth., 249 AD2d 184, 672 NYS2d 1011 [1st Dept 1998]).

Dated: August 31, 2011

Hon. Melvyn Tanenbaum

J.S.C.